In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1328

HAROLD JAMES JENKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that (1) the affidavit supporting the warrant to search the residence was defective because it did not set forth underlying circumstances upon which the informant based his conclusions; (2) the government failed to prove that the guns in question were "firearms"; (3) the evidence was insufficient to support a finding that the firearms were moving as, were a part of, or constituted interstate commerce; and (4) the government prosecutor improperly commented during closing argument upon facts not in evidence.

Following a jury trial in the United States District Court for the Southern District of Ohio, petitioner was convicted of having knowingly received, concealed or stored stolen firearms constituting interstate commerce, in violation

of 18 U.S.C. 922(j).[1] Petitioner was sentenced to a term of six years' imprisonment. The court of appeals affirmed (Pet. App. B).[2]

The evidence showed that on September 24, 1973, 224 guns valued at an estimated $80,000, were stolen from the residence of Eph Gose, a licensed firearm collector, in Tazewell, Tennesse (Tr. 4-10). Many of the weapons had been stored in their original cardboard gun boxes at the time of the theft (Tr. 7). Neighbors of Mr. Gose testified that they observed a white panel truck and a pickup truck at the Gose residence on September 24. One neighbor observed two men load into the pickup truck something wrapped in what appeared to be a sheet (Tr. 64-66, 69, 91, 107-110).

A few days after the theft, Treasury Agent Carroll Gibson learned from a confidential informant that a collection of firearms that had been stolen in Tennessee was being stored at a residence at 1131 Beaumont Street, Dayton, Ohio (Tr. 132-133). On September 28, 1973, Agent Gibson began surveillance at 1131 Beaumont Street (Tr. 133). Soon after, he observed petitioner enter the residence. On October 1, 1973, Agent Gibson again observed petitioner enter the residence at 1131 Beaumont Street. Petitioner then left the house and went to the garage.

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[1]Petitioner was indicted on two counts, the second count charging him with knowingly transporting stolen firearms in interstate commerce, in violation of 18 U.S.C. 2314. This count was dismissed by the trial court on petitioner's motion at the close of the government's case. Petitioner's co-defendant, Victor Mills, was charged only with violating 18 U.S.C. 2314. At the close of the government's case, the indictment against Mills was dismissed (Tr. 436).

[2]The court of appeals remanded the case to the district court for resentencing, since the six-year sentence imposed upon petitioner was in excess of that authorized by 18 U.S.C. 924(a), which provides a maximum five-year sentence.

He was carrying long, narrow boxes of a kind that, in Gibson's experience, normally contained rifles or shotguns. Several of the boxes had on them a red-and-black checkered design resembling the Winchester firearms' trademark (Tr. 136). Agent Gibson observed petitioner make several such trips, carrying boxes to the garage (Tr. 136). He also observed another man, who was subsequently identified as Victor Mills, leave the residence (Tr. 136-137). A white panel truck also departed from the vicinity of the residence (Tr. 137-138).

On October 2, 1973, Agent Gibson obtained a warrant to search the premises (Tr. 141, 143). When Agent Gibson and other Treasury agents opened a garage window, they observed that the floor of the garage was covered with guns (Tr. 145). Agent Gibson then entered the garage through the window and proceeded to compare the serial numbers on the guns in the garage with those on the guns that were stolen in Tennessee (Tr. 145). Several of the serial numbers matched (Tr. 145). Gibson then dusted several of the weapons and gun boxes for fingerprints (Tr. 147). A palm print found on one gun box was subsequently identified as belonging to petitioner (Tr. 264, 345-346).[3]

Petitioner and co-defendant Mills subsequently were apprehended in the white panel truck that had been observed earlier at the Beaumont Street residence. They then were arrested and the truck was impounded (Tr. 215-220). On October 4, 1973, the agents obtained a search warrant to search the truck (Tr. 148). Inside the truck they found a gun key that fit a gun case found in the Beaumont garage, a gun slipcover, and cardboard gun boxes whose serial numbers matched those on guns located

[3] The fingerprint of Jame Edward Meadows, the lessee of the white panel truck (Tr. 456-460), was subsequently discovered on another of the boxes (Tr. 356).

in the garage (Tr. 149-151). Cardboard fragments from the truck matched the cardboard of a gun box found in the garage (Tr. 405).

The evidence also showed that petitioner had contracted to purchase the property at 1131 Beaumont Street; the closing date for the purchase was October 9, 1973 (Tr. 280, 284). Two of the lessees testified that petitioner had been visiting the premises about once a week and had access to the garage (Tr. 233, 236, 302-303).

1. Petitioner contends (Pet. 12) that the affidavit supporting the warrant to search the Beaumont Street premises was defective because it did not set forth the underlying circumstances from which the informant concluded that guns that had been stolen in Tennessee were located there, as required by *Aguilar* v. *Texas,* 378 U.S. 108, and *Spinelli* v. *United States,* 393 U.S. 410.

The affidavit disclosed that a confidential informant had advised Agent Gibson that a large number of firearms, primarily "Winchester Lever action" rifles, had been stolen from Tennessee and were being stored at 1131 Beaumont Street, Dayton, Ohio. The informant had proven to be reliable on three separate occasions within the two previous months and had provided Agent Gibson with information that twice had resulted in the seizure of illegal weapons. After receiving the present information, Agent Gibson was able to corroborate the fact that a large number of rifles, primarily of a type described as "Winchester Lever action," recently had been stolen from a residence in Tennesse (Pet. 9-10).[4]

[4]Agent Gibson did not detail in the affidavit the results of the surveillance.

While the affidavit did not set forth the underlying circumstances from which the informant concluded that the stolen guns were located on the premises, it is necessary to apprise a magistrate of such facts only when the affidavit is based "solely on the hearsay report of an unidentified informant." *United States* v. *Harris*, 403 U.S. 573, 576. Here, however, the affidavit was not based solely upon the hearsay report of the informant. It was also based upon the agent's own independent corroboration of several of the facts that the informant disclosed, such as that a large number of guns recently had been stolen in Tennessee and that many of them were "Winchester Lever action" rifles. Cf. *Draper* v. *United States*, 358 U.S. 307. Moreover, the informant's information was sufficiently detailed to belie the possibility that it was a mere "casual rumor." *Spinelli* v. *United States, supra*, 393 U.S. at 416. The independent corroboration, coupled with the agent's knowledge of the informant's proven reliability and the detail with which the information was given, provided an adequate basis from which the magistrate properly determined that probable cause existed for the search. *Id.* at 415.

2. Petitioner also contends (Pet. 19-20) that he was entitled to a judgment of acquittal because the government failed to prove that the guns in question were "firearms" under 18 U.S.C. 922(j).[5] The question whether the guns

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[5]The term "firearm" is defined in the Gun Control Act, 18 U.S.C. 921(a)(3), to include:

> * * *(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

The term "antique firearm" is defined in 18 U.S.C. 921(a)(16) as:

that the government introduced at trial, which had been stolen in Tennessee and recovered on the Beaumont Street premises, were "firearms" within the meaning of the Gun Control Act was, however, a legal issue within the sole competence of the court. The court properly concluded that the guns were "firearms" and so instructed the jury (Tr. 483).

The Gun Control Act, 18 U.S.C. 921(a)(3), defines "firearms" to include "any weapon * * * which will or is designed to or may readily be converted to expel a projectile by the action of an explosive." The inventory list of the 224 stolen guns, introduced into evidence by the government without objection (Tr. 95), indicated each gun's type (revolver, pistol, rifle, or shotgun), make (Colt, Browning, Winchester, etc.), model, caliber, and serial number. It was appropriate for the court to take judicial notice of the commonly known fact that these guns were designed to "expel a projectile by the action of an explosive."[6]

(A) any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898; and

(B) any replica of any firearm described in subparagraph (A) if such replica—

(i) is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition, or

(ii) uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade.

[6]The popular recognition of these guns as "firearms" is supported by the fact that the guns were characterized as "firearms" throughout the trial (see, *e.g.*, Tr. 6-9, 11, 20), during which time petitioner's counsel never objected to the characterization. Indeed, petitioner's counsel also characterized the guns as "firearms" (Tr. 191-192). See *United States* v. *Beebe*, 467 F.2d 222, 224-225 (C.A. 10), certiorari denied, 416 U.S. 904.

While antique firearms are specifically excluded from coverage of the Gun Control Act (see 18 U.S.C. 921(a)(3) and 921 (a)(16), *supra*,

3. Petitioner further contends (Pet. 15) that the evidence was insufficient to support a finding that the firearms in question were "moving as * * * a part of, or * * * constitute[d], interstate * * * commerce" (18 U.S.C. 922(j)).[7]

Viewed in the light most favorable to the government (*Glasser* v. *United States,* 315 U.S. 60, 80), however, there was ample evidence from which the jury could have found that petitioner's storage and concealment of the firearms was a step in their interstate movement. The firearms were stolen in Tennessee on September 24, 1973, on which date a white panel truck was observed at the residence where the theft occurred. Four days later, on September 28, petitioner was observed at the Beaumont Street residence in Dayton, Ohio, where the stolen firearms were subsequently discovered. On October 1, petitioner was observed carrying gun boxes to the garage of the residence. On October 2, a white panel truck was observed at the residence. A search of the garage on that day revealed the stolen firearms, and a subsequent search of the white panel truck established that it had been used to transport the firearms. The evidence therefore

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fn. 5), petitioner offered no proof that the guns at issue came within that exception. See *McKelvey* v. *United States,* 260 U.S. 353, 357; *United States* v. *Chodor,* 479 F.2d 661 (C.A. 1), certiorari denied, 414 U.S. 912.

[7]Petitioner also contends that it was incumbent upon the government to prove that he transported the stolen firearms, since count 1 of the indictment, charging him with violating 18 U.S.C. 922(j), alleged that he transported as well as stored and concealed them. The fact that the indictment inadvertently contained the allegation of transportation, which is not an element of 18 U.S.C. 922(j), did not, however, affect the validity of the indictment or ultimate conviction, since inclusion of the unnecessary allegation was mere surplusage. See, *e.g., United States* v. *Hyde,* 448 F.2d 815, 839 (C.A. 5); *United States* v. *McGlamary,* 441 F.2d 130, 134 (C.A. 5).

fully supported a finding that the interstate scheme was ongoing at the time the firearms were concealed and stored. See *Lee* v. *United States*, 363 F.2d 469, 475 (C.A. 8), certiorari denied, 385 U.S. 947; *Pearson* v. *United States*, 378 F.2d 555, 560 (C.A. 5).[8]

4. Petitioner contends, finally, that the government prosecutor improperly commented upon facts not in evidence by referring in closing argument to a "large organization" and "continuing investigation" (Pet. 21). While we are unable to examine the remarks in context, since the closing arguments were not transcribed, we note that evidence introduced at trial showed that at least three other persons were likely to have been involved in the interstate transaction.[9] In any event, any error was cured by the

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[8]Petitioner's reliance upon *United States* v. *Ruffin*, 490 F.2d 557 (C.A. 8), is misplaced, since *Ruffin* is fully consistent with the decision in the instant case. In *Ruffin* the defendants were found to be in possession of a firearm which had been stolen 41 days before. The court held that proof demonstrating only that the firearms had at some time in the past moved interstate was insufficient to support a conviction under 18 U.S.C. 922(j). The court reasoned that while the time period between the interstate theft and subsequent possession was a very significant factor in determining the sufficiency of the evidence, "there must also exist other corroborative facts to support the charge that the defendants' possession of the stolen article was an intermediate or final step in the completion of an interstate scheme" (*id.* at 562-563). Such corroborative facts were established in the instant case.

[9]The evidence showed that the theft was accomplished by two unidentified males; Mills and one Bobby Derrick (Tr. 440) were observed, along with petitioner, in the garage of the Beaumont residence on October 2, a short while before the weapons were recovered; the white panel truck had been leased by James Meadows, whose fingerprint was discovered on one of the gun boxes.

court's subsequent instruction that the remarks of counsel in argument or otherwise "do not constitute evidence and * * * should not be considered by [the jury] in arriving at [a] verdict" (Tr. 493). See *United States* v. *Dupart*, 483 F.2d 1393, 1395 (C.A. 5), certiorari denied, 415 U.S. 984; cf. *United States* v. *Roberts*, 481 F.2d 892, 895 (C.A. 5).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.